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No. 59494-0-I

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION ONE

In re the Custody of E.A.T.W. and E.Y.W.

VITO & YASUKO GRIECO

Petitioners/Respondents

and

SACHI T. WILSON

Respondent/Moving Party

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STATE OF WASHINGTON
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ON REVIEW FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

The Hon. Suzanne Barnett

APPELLANT'S OPENING BRIEF

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A. ASSIGNMENTS OF ERROR

1. The trial court erred when it denied the motion for revision. CP 60.

2. The trial court erred when it granted petitioners' request for a finding of adequate cause. CP 60.

3. The trial court erred when it ruled as follows:

Court only needs to find, under 26.10, that children are not in the custody of parents to find adequate cause.

CP 61.

4. The trial court erred when it ruled as follows:

Court cannot determine issues based on written materials; trial is necessary.

CP 61.

Issues Pertaining To Assignments Of Error

1. To satisfy adequate cause in a nonparental custody proceeding, must petitioners establish prima facie facts that would support relief on the merits, not just that the children are not in the parent's custody, which satisfies the statute's standing requirement?

2. Is an adequate cause proceeding to be conducted on affidavits, as the statute provides?

B. STATEMENT OF THE CASE

Two children are the subjects of these proceedings. Their parents separated in August, 2002, but did not divorce. CP 21-22, 76-79. The mother, who was suffering a recurrence of cancer, had her parents move in with her and the children. The father's efforts to maintain his involvement with the children was frustrated, resisted, and obstructed, so long as the mother's parents lived with her. CP 76-79. The mother died in 2004. Pressured by the grandparents, and to spare the children another big change, the father agreed to leave the children temporarily in the care of the grandparents. CP 79. He "never intended this to be a permanent step," but, rather, "a transition over time." CP 79.

However, the Griecos continued their efforts to marginalize the father and to withhold the children from him. CP 79-81. In October 2006, the grandparents filed a petition for nonparental custody petition, which the father opposed. CP 1-7, 68-71. The grandparents alleged adequate cause as follows:

The children have not been in the physical custody of either parent since the death of their mother on 10/29/04. Father left the family home in 8/02. The children have been in custody of the grandparents/de facto parents since at least July 2003 and in the sole custody of the grandparents/de facto parents since the death of their natural mother 10/29/04.

The parties agreed that the children should reside with the petitioners and signed an agreement dated February 2, 2006.

CP 6. The agreement does not specify a duration, and, in any case, bears no incidents of irrevocability.

The grandparents argued that the fact that the children are not in the physical custody of either parent "alone is sufficient adequate cause for the third party custody action to go forward."

CP 50. Alternatively, they argued they had also proved the father is not a "suitable custodian" because he "voluntarily left the children with the petitioners for an extended period of time." CP 23.

The family court commissioner found adequate cause "based on the fact that the children are in the physical custody of the grandparents and have been for a few years and it would be detrimental to remove them from the grandparents' care." CP 53. The father moved for revision. CP 56-59. On revision, the trial judge found adequate cause solely on the basis that the children are not in the custody of the parents. The court ruled:

Court only needs to find, under 26.10, that children are not in the custody of parents to find adequate cause.

CP 60-61. The court also ruled that the:

Court cannot determine issues based on written materials; trial is necessary.

CP 61. These orders supersede those of the family court commissioner. *In re Marriage of Dodd*, 120 Wn. App. 638, 644, 86 P.3d 801 (2004).¹ Wilson filed a timely Notice of Discretionary Review from the court's order (CP 62-66), which this Court granted. The Griecos moved to modify, to which motion Wilson has responded.

C. ARGUMENT

1. THE ADEQUATE CAUSE THRESHOLD FOR NONPARENTAL CUSTODY IS SATISFIED ONLY BY PROOF PRIMA FACIE THAT THE PETITION IS MERITORIOUS.

The trial court in this case found adequate cause to proceed on the nonparental custody petition because the "court only needs to find, under [RCW] 26.10, that children are not in the custody of parents to find adequate cause." CP 61. This standard is wrong in that it sets the bar far too low, contrary to statute, Washington case law, and constitutional mandate.

Washington vigorously protects the welfare of its children and the rights of their parents. Indeed, the state will not interfere

¹ Accordingly, Wilson does not set forth his arguments for why the commissioner's ruling also was erroneous.

with a fit parent's autonomy absent compelling reasons. *In re the Welfare of Sumey*, 94 Wn.2d 757, 762, 621 P.2d 108 (1980) (state can only intrude upon a family's integrity when "parental actions or decisions seriously conflict with the physical or mental health of the child.") (internal citations omitted). In particular, "[i]n a custody dispute between parents and nonparents the court must also take into consideration the parents' constitutionally protected priority right to the custody of their children." *Mecum v. Pomiak*, 119 Wn. App. 415, 81 P.3d 154 (2003) (emphasis added). *See, also, In re Custody of Smith*, 137 Wn.2d 1, 18, 969 P.2d 21 (1998) (some harm must threaten children for state to interfere with a fit parent's decision to deny third-party visitation).

Concern for parental autonomy motivated a recent change to the third-party custody statute. Formerly, the statute provided that a third party could petition for custody of a child "by filing a petition ... but only if the child is not in the physical custody of one of its parents or if the petitioner alleges that neither parent is a suitable custodian." RCW 26.10.030(1). The petition could proceed once the third-parties satisfied this standing requirement. In 2003, the legislature inserted a substantive requirement for an adequate cause hearing.

(1) A party seeking a custody order shall submit, along with his or her motion, an affidavit declaring that the child is not in the physical custody of one of its parents or that neither parent is a suitable custodian and setting forth facts supporting the requested order. The party seeking custody shall give notice, along with a copy of the affidavit, to other parties to the proceedings, who may file opposing affidavits.

(2) The court shall deny the motion unless it finds that adequate cause for hearing the motion is established by the affidavits, in which case it shall set a date for hearing on an order to show cause why the requested order should not be granted.

RCW 26.10.032 (emphasis added). The legislature added this requirement to protect parents from unconstitutional infringements on their rights by having to defend, in attenuated and costly legal proceedings, against baseless petitions. The legislature accomplishes this goal by requiring the third-party petitioners to satisfy a substantive threshold, in addition to establishing standing. In this manner, it addresses the concern voiced by this Court in *In re Custody of Nunn*, 103 Wn. App. 871, 14 P.3d 175 (2000).

In *Nunn*, as here, a child had lived primarily with one parent, his father, who then died. The child then went to live with the paternal aunt, who, with funds provided by the deceased father, challenged the mother's right to custody. Many years, dollars, and false allegations later, the mother's rights were restored. But the

failure to address the merits early in the proceedings

... resulted in months of irrelevant inquiry by the guardian ad litem into the relative merits of the mother and aunt as prospective custodians, a five-day trial, an erroneous custody order, and this appeal-not to mention unwarranted disruption of the parent-child relationship of Arneson and her son, and the resulting heartache to each of them.

103 Wn. App. at 874.

This Court was so outraged in *Nunn* that it read into the statute's standing requirement a substantive requirement, urging that the merits of the case presented "a threshold issue that should be addressed as early in each nonparental child custody proceeding as may be practicable in all the circumstances of the given case." 103 Wn. App. at 874. However, in its effort to correct this wrong, the court conflated procedure and substance (i.e., standing requirements and merits of the case). The Supreme Court ultimately rejected this interpretation, clarifying that the procedural standing requirement remains separate from the substantive custody question. *In re Custody of Shields*, 157 Wn.2d 126, 139, 136 P.2d 117 (2006) ("... the [*Nunn*] court misdirected its concern and set up a substantive standing requirement, which is really a concern about the merits.").

After the *Nunn* decision, the legislature addressed the court's

concerns by inserting a substantive threshold to be satisfied, virtually identical to that in modification trials, before subjecting a parent to a long, expensive, unwarranted intrusion. Thus, it is no longer sufficient merely to establish standing, as, for example, many people could easily do now by the fact of their caring for the children of military personnel serving extended tours of duty in the Middle East. Rather, in order to give the new statute effect, and, in particular, to implement the lesson of *Nunn*, third-party petitioners must establish adequate cause with facts that would establish the merits of the case, in other words, establishing “that placement of the child with the fit parent will result in actual detriment to the child's growth and development.” *In re Custody of Shields*, 157 Wn.2d at 144.

The Griecos have failed to satisfy this requirement and, as Commissioner Neel recognized, going forward with a trial in spite of this failure violates the statute and the parent's constitutional rights.

2. STANDING AND ADEQUATE CAUSE ARE SEPARATE TESTS.

Lacking adequate cause to proceed to trial, the Griecos opted to persuade the court that they did not need adequate cause; they needed merely to have physical custody of the children. Their

reading of the statute not only ignores the text, it is at odds with our understanding of the adequate cause threshold, as illustrated by the parenting plan modification procedure.

First, it is instructive to compare the new adequate cause requirement in the nonparental custody statute with the one provided in the modification statute, since their structure and text are virtually identical. The nonparental custody statute provides:

(1) A party seeking a custody order shall submit, along with his or her motion, an affidavit declaring that the child is not in the physical custody of one of its parents or that neither parent is a suitable custodian and setting forth facts supporting the requested order. The party seeking custody shall give notice, along with a copy of the affidavit, to other parties to the proceedings, who may file opposing affidavits.

(2) The court shall deny the motion unless it finds that adequate cause for hearing the motion is established by the affidavits, in which case it shall set a date for hearing on an order to show cause why the requested order should not be granted.

RCW 26.10.032. The modification statute provides:

A party seeking a temporary custody order or a temporary parenting plan or modification of a custody decree or parenting plan shall submit together with his motion, an affidavit setting forth facts supporting the requested order or modification and shall give notice, together with a copy of his affidavit, to other parties to the proceedings, who may file opposing affidavits. The court shall deny the motion unless it finds that adequate cause for hearing the motion is established by the affidavits, in which case it shall set a date for

hearing on an order to show cause why the requested order or modification should not be granted.

RCW 26.09.270.

Our courts have made clear that this threshold is a substantive one in modification proceedings, and “requires a petitioner to set forth specific factual allegations, which if proven would permit a court to modify the plan under RCW 26.09.260.”

Bower v. Reich, 89 Wn. App. 9, 14, 964 P.2d 359 (1997).

Moreover, the facts alleged must be relevant to the grounds for seeking modification, meaning they must relate to the substantive standard. ***In re Marriage of Flynn***, 94 Wn. App. 185, 191, 972 P.2d 500 (1997). By means of this gate-keeping mechanism, useless and harassing hearings on modification petitions are prevented. ***In re Marriage of Adler***, 131 Wn. App. 717, 724, 129 P.3d 293 (2006).

The same principles apply here, but with special force, because of the constitutional protections afforded parents involved in disputes with nonparents. For nonparental custody, the substantive test may be described as a “best interests plus” test. The petitioner must prove either (1) the parent is unfit, or (2) actual detriment to the child's growth and development from placement

with an otherwise fit parent. *In re Custody of Shields*, 157 Wn.2d 126, 136 P.2d 117 (2006).

Under the heightened standard, a court can interfere only with a fit parent's parenting decision to maintain custody of his or her child if the nonparent demonstrates that placement of the child with the fit parent will result in actual detriment to the child's growth and development.

Id., at 144. Thus, to establish adequate cause to proceed to a trial on this claim, a petitioner must allege facts that, if proven, would meet this substantive standard.

This is the substantive standard that must be established for adequate cause in third-party custody proceedings. It is also clear that this requirement operates separately from the issue of standing. *See In re Custody of Smith*, 137 Wn.2d 1, 969 P.2d 21 (1998) (upholding standing provision that "anyone" at "anytime" may petition for visitation, but striking down the "best interests" substantive standard). In short, it is one thing to gain admission to the courthouse but quite another to subject a fit parent to a trial absent adequate cause to do so. The fact that the children are not in the parent's physical custody satisfies the standing requirement, but not the adequate cause requirement. And the trial court does not have the authority to ignore the adequate cause statutory

requirement. **See *Robertson v. Robertson***, 113 Wn. App. 711, 715, 54 P.3d 708 (2002) (court may not ignore statutory dictate without finding statute unconstitutional).

Here, the court was wrong when it declared adequate cause to be satisfied solely by a showing that the children are not in the custody of their parent. Not only is this an erroneous articulation of the standard, it is one that would radically enlarge the statute's reach, completely at odds with the gate-keeping function. Any short-term custodian would satisfy adequate cause to proceed to trial on a nonparental custody petition and every parent would be at risk of litigating their rights whenever they make use of temporary caregivers. In any case, the court here did not hold the petitioners to their burden, as required by statute and as set forth in ***Shields***, and the petitioners did not meet their burden.

3. THE STATUTE REQUIRES ADEQUATE CAUSE TO BE DETERMINED ON THE BASIS OF WRITTEN MATERIALS BECAUSE THE POINT OF THE THRESHOLD IS TO AVOID AN UNWARRANTED TRIAL.

Hand in glove with the statutory purpose of minimizing interference in family relationships, the adequate cause procedure is designed to be economical, meaning that it is to be based on documentary evidence. The statute expressly declares that the

petitioning party shall submit "an affidavit" establishing adequate cause. RCW 26.10.032(1). Only when this evidence establishes adequate cause may the parties receive a full-blown evidentiary hearing. *In re Marriage of Flynn*, 94 Wn. App. 185, 191, 972 P.2d 500 (1999).

The Griecos' affidavits fail to establish adequate cause. As further indication that the trial court misapprehended the nature of the threshold requirement, the court ruled it "cannot determine issues based on written materials; trial is necessary." CP 61. Thus, again, the court ignored the necessity of addressing the merits of the case at the time and in the manner prescribed by statute. However, compliance with the statute is mandatory.

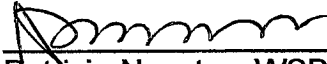
Bower v. Reich, 89 Wn. App. at 14.

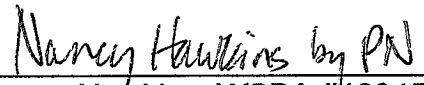
D. CONCLUSION

Adequate cause is more than and separate from standing. It is a requirement that third-party petitioners preliminarily establish the merits of their case by facts alleged in affidavits. Failure to satisfy adequate cause requires dismissal of the petition. In this manner, parents are protected from costly invasions of their autonomy and privacy. Because the adequate cause threshold was not satisfied here, Sachi Wilson respectfully asks this Court to

reverse the trial court's order determining adequate cause and to remand for dismissal of their petition.

Respectfully submitted this 8th day of August 2007.


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